CONCLUSION

For the reasons and authorities set forth above, it is respectfully prayed that a Writ of Certiorari be granted to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT, S. D. FLORIDA,
MIAMI DIVISION.

Civ. No. 72-144.

BARBARA A. GREEN, as natural guardian, etc., et al.,
Plaintiffs,

v.

HARRY J. ROSS *et al., Defendants.*

March 6, 1972

Order

ATKINS, District Judge.

This cause is before the Court on various motions filed by the defendants. It is a suit by and on behalf of certain relatives of Michael Ray Green to recover damages which allegedly occurred as a result of an incident in which the decedent was run over by a speedboat while skindiving. The Court has considered the memoranda submitted and heard the arguments of counsel. A few general observations seem appropriate as we venture into the relatively uncharted waters to which district courts were given access by the landmark opinion in Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

Moragne, of course, for the first time permitted a wrongful death action to be brought in admiralty under the maritime law. In this case, we are initially confronted by two problems which the *Moragne* court anticipated: the proper beneficiaries and the proper elements of damages. The Court there suggested that lower courts might look for guidance to the state wrongful death acts, the Jones Act, the Death on the High Seas Act, or the Longshoremen's and Harbor Workers' Compensation Act.

It is evident that *Moragne* was a remedial decision. Certain plaintiffs, because of the location of their fatal injuries or simply because they died rather than survived, found the doors of the federal court barred to them. The apparent injustice fostered by The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886) has been cured. It also appears that, in the Fifth Circuit, this newly-created cause of action to redress wrongful deaths occurring within state territorial waters is to be liberally fashioned. In Dennis v. Central Gulf Steamship Corp., 323 F.Supp. 943, 947 (E.D. La.1971), Judge Rubin held that "state wrongful death statutes no longer provide the measure of damages for death in coastal waters." While affirming the decision as to specific recoverable elements of damages, the Fifth Circuit noted that, despite the admitted quest for uniformity, "federal courts may look to state law and adopt it as the general maritime law if it is not inimical to the maritime law." Dennis v. Central Gulf Steamship Corp., 453 F.2d 137, 140 (5th Cir. 1972).

These two themes of liberality and uniformity must therefore be reconciled. Defendants argue strenuously that the Death on the High Seas Act (D.O.H.S.A.) must be followed wherever possible. If not, death cases might be routinely plagued by the question of whether or not the wrongful act which caused death occurred within a marine league from shore, with plaintiffs striving to state either a D.O.H.S.A. or a *Moragne* claim, depending on the allowable recovery. This is persuasive only to the extent that *Dennis* does not compel a contrary position, as it does in reference to damages.

I feel that the beneficiaries named in the complaint are all properly included. The only one challenged by defendants is Charles Anthony Laphan, a natural child of the decedent's widow who was supported by the decedent from the date of marriage until his death. Relying upon the dependent relative test of the D.O.H.S.A., I think that

recovery on behalf of the decedent's stepson is permissible here. *Accord,* Petition of United States, 418 F.2d 264, 270 (1st Cir. 1969).

It is appropriate, however, for the claims to be brought by the personal representative for the exclusive benefit of the eligible beneficiaries, as is done under the D.O.H.S.A. The complaint in the case *sub judice* must be amended in that respect to state a claim by the administratrix for the exclusive use and benefit of the decedent's widow, son, and stepson. The claim on behalf of the estate for survival damages, such as decedent's pain and suffering and loss of income between the time of the accident and death, may be included with the above described claims of the personal representative, although such claim would, of course, inure to the benefit of the estate.

Substantively, the complaint is satisfactory in most respects. Plaintiff concedes that, under Branch v. Schumann, 445 F.2d 175 (5th Cir. 1971), defendant Ross cannot be held to the high standard of care created by F.S.A. § 371.52. The board is correctly deemed a "dangerous instrumentality," though, and said reference may remain in the complaint for whatever other purpose it may serve.

The recovery sought for loss of consortium and companionship is, within the meaning of *Dennis, supra,* "inimical to the maritime law," and must therefore be stricken. *See, e. g.* Simpson v. Knutsen, 444 F.2d 523 (9th Cir. 1971); Petition of United States Steel Corp., 436 F.2d 1256, 1279 (6th Cir. 1970). Similarly, the demand for jury trial is inapposite in this case, absent diversity of citizenship. This cause is brought under the admiralty jurisdiction for wrongful death arising from a breach of maritime duties, i. e., negligence. In spelling out the elements of the *Moragne* "cause of action", the courts are not free to create a right to trial by jury where none has existed. Apart from any independent jurisdictional basis (which is not alleged here), an admiralty claimant has no jury

trial right unless he sues under a statute which expressly provides it, such as the Jones Act. Ballard v. Moore-McCormack Lines, Inc., 285 F.Supp. 290, 292 (S.D.N.Y. 1968).

At the hearing, I indicated that the admiralty comparative negligence rule, rather than the absolute contributory negligence bar, would govern this case. *Cf.* Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970); Simpson v. Knutsen, *supra.* I also stated, with the agreement of counsel, that punitive damages were not recoverable except, perhaps, in relation to the claim for survival damages. Thus it was decided that the motion to strike the prayer for punitive damages should be denied without prejudice to defendants' right to renew it at a later date.

Accordingly, it is ordered and adjudged as follows:

1. The motion to dismiss and the motion to require proper pleadings are granted to the extent indicated above of requiring plaintiff to file an amended complaint as described *supra* asserting the claims through the personal representative for the exclusive use and benefit of the named beneficiaries. Leave to amend within ten days from the entry of this order is hereby granted.

2. In all other respects, said motions are denied. Defendants shall answer the amended complaint within ten days from the date of receipt of it.

3. The motion to strike the prayer for damages for loss of companionship and consortium is granted.

4. The motion to strike the demand for trial by jury is granted.

5. In all other respects, the motion to strike is denied.

6. The motion for more definite statement is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3705

(June 21, 1973)

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

CLARK, Circuit Judge: Barbara Green, as Administratrix and personal representative of the estate of her deceased husband, Michael Ray Green, brought this suit against Harry J. Ross and the Travelers Indemnity Co. Her complaint alleged that Ross' negligence caused the death of her husband, who was struck by the propeller of the defendant's outboard motorboat while skin diving in the Atlantic Ocean.[1] The district court concluded, after a non-jury trial, that the defendant was not negligent. Mrs. Green appeals. We affirm.

The appellant's prime contention is that the court below should have granted her request for a jury trial.[2] Mrs. Green invoked the admiralty and maritime jurisdiction of the district court to hear her claims arising under "federal maritime common law" under the Florida Wrongful Death Act. The claim for wrongful death recovery under general maritime law is founded on the Supreme Court decision in *Moragne* v. *States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 339 (1970). *Moragne* merely removes the bar to recovery by survivors under general federal maritime law in those cases where an injury occurring on navigable waters results in death. *Id.* 398 U.S. at 406, 90 S.Ct. at 1790. Historically, actions for personal injury brought in the federal admiralty jurisdiction under gen-

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[1] The district court found that the accident occurred approximately two miles east of Elliot Key, Dade County, Florida, and therefore with the territorial waters of the State of Florida, *Fla. Stat.* § 6.11.

[2] The opinion of the district court denying the right to a jury trial is reported at 338 F.Supp. 365, 367 (S.D. Fla. 1972).

eral maritime law have not entitled the injured plaintiff to a jury trial, unless he establishes an independent jurisdictional basis for such a trial. See *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 17, 83 S.Ct. 1646, 1648, 10 L.Ed.2d (1963); 9 Wright & Miller, Federal Practice and Procedure § 2315 (1971). We agree with the district court that a *Moragne* survivor-claimant has no greater right to jury trial than his decedent, and thus affirm the denial of a jury trial on appellant's *Moragne* action.

Mrs. Green also alleged a cause of action based on the Florida Wrongful Death Act, Fla. Stat. § 768.01.[3] Prior to *Moragne*, this Act provided a basis for recovery in cases of fatal accidents on Florida's navigable waters resulting from negligence which was enforceable through a libel in rem or in personam brought in the admiralty jurisdiction of the federal district court, *Weeks* v. *Alonzo Cothron, Inc.*, 426 F.2d 674 (5th Cir. 1970); *see Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921); *The Tungus* v. *Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959). We need not decide here whether *Moragne* now preempts such actions in federal court based on state wrongful death statutes,[4] since even if a concurrent cause of action under the Florida Act for wrongful death on navigable waters still exists, Mrs. Green could have invoked

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[3] The Florida Wrongful Death Act applicable to the case *sub judice*, *Fla. Stat.* § 768.01-768.03, has been repealed and replaced by *Fla. Stat.* § 768.16-768.27, effective July 1, 1972.

[4] A number of recent decisions have held that *Moragne* preempts causes of action brought in the federal admiralty jurisdiction under state wrongful death statutes. See, *e.g.*, United States Steel Corp. v. Lamp, 436 F.2d 1256, 1278-79 (6th Cir. 1970), *cert. denied* 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153 (1971); Dennis v. Central Gulf Steamship Corp., 323 F.Supp. 943, 946-48 (E.D. La. 1971), *aff'd* 453 F.2d 137 (5th Cir. 1972). *But cf.* Weeks v. Alonzo Cothron, Inc., 466 F.2d 578, 580 (5th Cir. 1972). See generally, Comment, The General Maritime Action from Wrongful Death: Pleading and Practice in the Wake of *Moragne*, 10 Houston L. Rev. 101 (1972); Comment Maritime Wrongful Death After *Moragne:* The Seaman's Legal Lifeboat, 59 Geo. L. J. 1411 (1971).

federal jurisdiction only in admiralty[5] and therefore her suit under the state statute would have been governed by admiralty procedures. *See generally Weeks* v. *Alonzo Cothron, Inc., supra* 426 F.2d 674; *Emerson* v. *Holloway Concrete Products Co.*, 282 F.2d 271 (5th Cir. 1960), *cert. denied* 364 U.S. 941, 81 S.Ct. 459, 5 L.Ed.2d 372 (1961); *Graham* v. *A. Lusi, Ltd.*, 206 F.2d 223 (5th Cir. 1953); *Young* v. *Clyde S.S. Co.*, 294 F. 549 (S.D. Fla. 1923). Thus it is clear that both of the federal jurisdictional bases which Mrs. Green sought to invoke lay exclusively on the admiralty, rather than the civil, side of the district court.

On appeal, the appellant urges this court to abandon traditional admiralty practice and declare a right to jury trial in cases involving small craft operated by lay mariners on navigable waters since no "blue water" expertise is required to resolve the issues. We decline to carve out this narrow exception to well-established procedural rules.[6] Additionally, we note that the appellant bypassed a readily available state court action under the "savings-to-suitors" clause, 28 U.S.C. § 1333(1), and instead elected this traditionally non-jury forum. *Cf. United States Fidelity & Guaranty Co.* v. *Reed Construction Corp.* 149 So.2d 578 (Fla.App. 1963).

Second, the appellant contends that the trial judge erroneously sustained an objection to the introduction of a copy of police report into evidence. The defendant objected on the basis of authenticity, and the appellant then failed to offer any proof whatsoever that the report was in fact

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[5] The appellant lacked any non-admiralty basis for federal jurisdiction, such as diversity of citizenship, *see, e.g.*, United New York & New Jersey Sandy Hook Pilots Association v. Halecki, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed. 2d 541 (1959); or the Jones Act, *see* Fitzgerald v. United States Lines Co., *supra*.

[6] It is highly questionable if this alteration of federal procedure could be effected by opinion of an inferior court. 28 U.S.C. § 2073. *See also* Fitzgerald v. United States Lines Co., *supra*, 374 U.S. at 22, 83 S.Ct. at 1651 (Harlan, J., dissenting).

authentic. The court's ruling was correct. F.R.Civ.P. 44; See also proposed Rules of Evidence for the United States Courts and Magistrates, Rules 901-902 (1972). The court did not reach the question of admissibility of a duplicate.

Third, despite Mrs. Green's objections, the admission of the deposition of the Charles Baggett, an expert for the defendant, was within the trial court's discretion under Local Rule 14(E) of the district court. Although the defense counsel failed to timely present the plaintiff's counsel with a resume of the content of the proposed expert testimony, as required by the local rule, the spirit of the rule had been satisfied. Prior to the trial the plaintiff's counsel knew that the expert would be deposed and knew the content of his testimony. Co-counsel for the plaintiff was present at the deposition. He was told that the deposition would be offered by the defendant, and his early awareness allowed him time to arrange for the deposition of an expert of his own, if he wished to offer one.

Finally, we hold that the findings of the trial judge, giving due regard for the opportunity of the trial court to judge credibility, are not clearly erroneous F.R.Civ.P., Rule 52.

AFFIRMED.